BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN J. DUERMEIER	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,045,964
	)	
CITY OF TOPEKA	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 12, 2009, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery. Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Larry G. Karns, of Topeka, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant sustained injury by a single accident that arose out of and in the course of his employment with respondent. The ALJ found that claimant did not have a series of accidents. Although the claimant failed to provide respondent with notice of his accident within 10 days of April 9, 2009, he gave notice within 75 days. The ALJ found that claimant had just cause to do so and, accordingly, ordered respondent to provide claimant with medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 11, 2009,[1] Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether claimant suffered an accidental injury or injuries that arose out of and in the course of his employment and whether claimant gave respondent timely notice of his alleged accident.

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[1] The transcript of the preliminary hearing is dated August 1, 2009, but the ALJ's Order for Medical Treatment and the Division records indicate the hearing was held on August 11, 2009.

Claimant contends that although he did not provide notice to respondent of his April 9, 2009, accident within 10 days, he satisfied the notice requirement by establishing that he had just cause for his failure to report his injury, thereby extending the notice requirement to 75 days. In the alternative, claimant argues that his work-related low back injury was the result of a series of repetitive work activities and, therefore, his appropriate date of accident is June 9, 2009, the date respondent received written notice of his injury.

The issues for the Board's review are:

(1) Did claimant sustain an injury that arose out of and in the course of his employment with respondent? If so, did he sustain a single accident on April 9, 2009, or a series of accidents from April 9, 2009, through June 9, 2009?

(2) Did claimant give respondent timely notice of his accident?

FINDINGS OF FACT

Claimant works for respondent as an arborist. His job duties include planting, trimming and removing trees, grinding stumps, and carrying and chipping brush. On April 9, 2009, he spent 5 1/2 to 6 hours shoveling dirt from a truck into a wheelbarrow, pushing the wheelbarrow to an area where some ruts were located, and then spreading the dirt in the ruts. Although he did not have a specific accident, at the end of the day he felt fatigue, soreness and some tingling in his low back and left leg. Although claimant knew he had hurt his back at work on April 9, he did not immediately report his injuries to anyone at respondent because he thought he just had sore muscles or a strained back that would respond to conservative treatment.

Claimant was able to work on April 10, although he was feeling stiffness, soreness and muscle fatigue. He said that two or three days after the injury, he started noticing some discomfort in his genital area and some shooting pain and tingling down his left leg, and he knew then that he had somehow injured his back as opposed to just having some soreness or stiffness. He continued to work, and his back condition worsened. He particularly noticed problems when he lifted logs after removing them from trees and fed them into a brush chipper or while running a chain saw over his head. He was seen by various medical providers, including Dr. Lucas, a chiropractor, whom he saw on April 14 and May 1, 2009. He was seen by Dr. Melissa Colburn on May 7, at which time he complained that his back had been bothering him for about a month. Claimant thinks he reported his injury to respondent sometime during the week of May 5, 2009, after he saw Dr. Colburn. On May 28, 2009, he had an MRI that showed he had a bulging disc at L3-L4 and a herniated disc at L4-L5. On June 5, 2009, claimant's attorney sent a demand letter to respondent, which was received by respondent on June 8, 2009. Claimant's Application

for Hearing was filed with the Division on June 8, 2009, and lists a date of accident as a "[s]eries from 4/19/09 through 6/5/09 & continuing."[2]

On March 30, 2009, claimant had created some ruts when he drove a vehicle through some property, and those were some of the ruts he was filling on April 9, 2009, when he injured his back. On April 3, 2009, he received a written reprimand for creating the ruts. The reprimand stated: "Further actions of this nature will result in progressive disciplinary action and possible termination."[3] Also, claimant's annual evaluation from January 1, 2008, through December 31, 2008, showed that he needed improvement in most areas. Claimant said he knew he was in trouble at work, and that had a "little bit something to do" with his not immediately reporting his injury.[4] When asked by the ALJ if he thought he would be fired, claimant answered: "I didn't really honestly know what was going to happen."[5]

Claimant admitted he was aware that if he had a workers compensation claim, he was supposed to report it right away. Claimant has had four or five previous workers compensation claims since beginning work for respondent, all of which he reported to respondent within a day or two of the accidents. However, he said in this case, he did not know what was going on with his back, and he had hoped that his conservative treatment would solve the problem.

Adam Moser, claimant's supervisor, testified that a poster was present in respondent's work area regarding workers compensation benefits. He also confirmed that claimant had previously turned some workers compensation claims into him. Mr. Moser said that sometime in early May 2009, claimant mentioned to him that he wanted a doctor's bill paid. When Mr. Moser asked what the bill was for, claimant said it was for treatment for an injury to his back from a date three or four weeks previous when he was shoveling dirt in ruts. Claimant told Mr. Moser that he did not immediately report his injury because he knew he was already in trouble. Mr. Moser said he has daily meetings with his employees, and claimant had opportunities to timely notify him of his accident but did not.

Claimant was evaluated by Dr. Pedro Murati on July 14, 2009, at the request of claimant's attorney. After taking a history and examining claimant, Dr. Murati diagnosed him with left SI joint dysfunction and low back pain with signs and symptoms of radiculopathy. Dr. Murati opined that claimant's current diagnoses were a direct result of

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[2] Form K-WC E-1, Application for Hearing filed June 8, 2009. Claimant testified that his initial injury was on April 9, 2009, rather than April 19, 2009, as set out on the Application for Hearing. P.H. Trans. at 9.

[3] P.H. Trans., Resp. Ex. A at 1.

[4] P.H. Trans. at 26.

[5] P.H. Trans. at 42.

his work-related injury on April 19, 2009.[6] Dr. Murati did not relate claimant's injury to a series of accidents.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[7] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[8]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[9]

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[6] Claimant testified that his injury occurred on April 9, 2009.

[7] K.S.A. 2008 Supp. 44-501(a).

[8] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[9] *Id.* at 278.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[11]

ANALYSIS

The ALJ determined that claimant suffered personal injury by accident on April 9, 2009, and that his accident arose out of and in the course of his employment with respondent. This Board Member agrees. Claimant relates his back injury to his work activities on April 9, 2009. By the end of the work day, claimant knew that he had injured his back. Although he did not miss work, claimant sought medical treatment on his own with a chiropractor within a few days of his accident. Both claimant's testimony and the medical evidence point to a single accident date of April 9, 2009, rather than a series of accidents.

Turning now to the issue of notice, again claimant knew he had injured himself at work on April 9, 2009. He also knew that work injuries were to reported to a supervisor immediately. Claimant had daily contact with his supervisor, yet admits he did not report his accident and injury within the 10-day period required by statute. Claimant contends

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[10] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[11] K.S.A. 2008 Supp. 44-555c(k).

there is just cause for extending his time to report his accident to 75 days because he did not think his injury was serious, he thought it would get better, and he was in fear of losing his job. However, claimant acknowledges that he had reported previous work injuries and those did not cause him to lose his job. Furthermore, at least by April 14, 2009, claimant knew his injury was not getting better and was bad enough that he sought treatment from a physician. In fact, claimant testified that his back continued to get worse after April 9, 2009, as he continued to work. These factors contradict claimant's reasons for not reporting his accident and injury within 10 days, which he knew was required. This Board Member is not persuaded that claimant has shown just cause for his failure to notify his employer of his work-related accident within 10 days. As such, claimant's notice to his employer on May 5, 2009, was not timely.

CONCLUSION

(1) Claimant suffered personal injury by accident on April 9, 2009, that arose out of and in the course of his employment with respondent.

(2) Claimant did not give respondent timely notice of his accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated August 12, 2009, is reversed.

IT IS SO ORDERED.

Dated this _____ day of November, 2009.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge